No. 75-398

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

FORREST GERRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court of appeals should have granted his petition for rehearing because a factual representation by government counsel in oral argument based on the record was incorrect, notwithstanding that the court revised its original opinion to reflect the corrected fact.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of having attempted, with co-defendant Elden Turcotte, to obstruct justice by endeavoring to persuade David Kraft to testify falsely before a grand jury, in violation of 18 U.S.C. 1503 (Count II); and of having conspired with co-defendant Turcotte to obstruct justice through Turcotte's perjury before a grand jury and through their endeavor to persuade David Kraft

to give false grand jury testimony, in violation of 18 U.S.C. 371 (Count III).[1] Petitioner was sentenced to two concurrent four-year terms of imprisonment to run concurrently with an earlier sentence imposed by the same court,[2] and was fined $5,000 on each count. The court of appeals affirmed (Pet. App. 1a-13a; 515 F. 2d 145). Petitioner filed a motion for rehearing with suggestion for rehearing *en banc*. The court of appeals revised its original opinion (Pet. App. 14a-15a) and then denied rehearing (Pet. App. 16a-18a).

1. In May 1972, a special federal grand jury for the Eastern District of New York commenced an investigation into possible violations of 18 U.S.C. 224, the Federal Sports Bribery Statute (Tr. 65). The grand jury concentrated on the harness racing industry in New York, and focused upon superfecta races in particular (*ibid.*).[3] It inquired into the ownership of harness racing horses (Tr. 67, 105), and the nature of petitioner's relationship with driver-trainers, in particular driver-trainer Elden Turcotte (Tr. 67-68). Among the witnesses called was David Kraft, who testified before the grand jury on May 21, 1973. Thereafter, Kraft was charged with perjury. After he agreed to cooperate with the government he again testified before the grand jury on September 10, 1973 (Tr. 166).

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[1]Petitioner was separately convicted of influencing the outcome of horse races by bribery, and conspiracy to commit this offense, in violation of 18 U.S.C. 224 and 371. *United States* v. *Gerry*, 515 F.2d 130, certiorari denied, No. 74-1480, October 6, 1975.

[2]Co-defendant Elden Turcotte was convicted on Counts two and three and was convicted on Count one of having perjured himself before the grand jury in violation of 18 U.S.C. 1623. Turcotte was sentenced to three concurrent one-year-and-a-day sentences.

[3]A superfecta is a race in which a winning bettor must select the first four horses in their order of finish. The grand jury was concerned with the superfectas because of the large amounts of money normally bet in them (Tr. 65).

At petitioner's trial, David Kraft testified that in March 1973, petitioner obtained his permission to put some horses in the name of Kraft Hill Farm[4] as a conduit for resale (Tr. 150-151).[5] In April 1973, Kraft became aware that two horses not belonging to Kraft Hill were racing under its name and that the purse winnings were being forwarded to Kraft Hill (Tr. 154-156, 247-251). Kraft spoke to petitioner about getting the horses out of Kraft Hill's name (Tr. 155), because he was apprehensive that the hidden ownership might adversely affect his sons' licenses to own horses (Tr. 158).

On July 21, 1973, petitioner informed Kraft that he was aware that Kraft had been before the federal grand jury, and that he was the only one who could hurt him in this investigation (Tr. 160-161). When Kraft complained to petitioner that the horses were still in Kraft Hill's name, petitioner responded that Turcotte had registration papers and that petitioner would bring the papers to Kraft so that the horses might be transferred to Turcotte (Tr. 165-166).

On August 4, 1973, petitioner told Kraft to tell the grand jury that "we have to say about this betting scheme that I called you up and gave you some horses that I handicapped, and you went to OTB [Off Track Betting] and bet them for me because I didn't have the time to get there. * * * This should take care of the extra few tickets that you said you cashed. If you say

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[4]Kraft Hill Farm is a corporation, the initial capitalization of which emanated from a transfer of racing horses originally owned by David Kraft to his two sons (Tr. 150-152). David Kraft's license to own horses had been revoked (Tr. 152), and Kraft's son Terry became the president of Kraft Hill Farm (Tr. 176).

[5]As an unlicensed owner, petitioner could not race horses although he could act as a broker in sales transactions (Pet. App. 4a).

it that way, that will cover everything" (Tr. 170). Petitioner also tendered the registration papers for the two horses so that Kraft could insert the name of Elden Turcotte (Tr. 173).

On August 19, 1973, petitioner introduced Turcotte to Kraft, explaining that Turcotte must be able to recognize Kraft "[i]n the event this investigation gets to a point where somebody has to know what they are talking about * * * " (Tr. 181). Turcotte then related a fabricated story about how he had received the two horses from Kraft and how the horses were eventually sold (Tr. 181-183).

Kraft testified that Turcotte told him this story so as to coordinate their statements "to the grand jury or to the FBI or any agency I am involved with regarding the ownership of the horses that * * * Turcotte has in his possession * * * " (Tr. 181). Turcotte also told Kraft that "you've got to say you raced these horses with me and this is the story we have to get together on" (Tr. 183). After Turcotte's departure, petitioner told Kraft that he would not get in any trouble over the superfecta investigation, and if Kraft would just tell "them" that he had purchased the horses for $21,000 and that they were owned by Kraft Hill Farm, there would not be any problem (Tr. 186).[6]

On August 30, 1973, Kraft told petitioner that he had informed the federal government of everything there was to know about the horses (Tr. 190-191). Petitioner responded: "Wholly mackeral, I told you to tell them about—tell them you own them damned horses and there wouldn't be no trouble" (*id.* at 191).

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[6]On cross-examination, Kraft testified that petitioner knew that Kraft had been arrested for perjury, and that Kraft had informed petitioner that he had been down there and "they" questioned him (Tr. 344).

In his defense petitioner testified that Kraft had requested him to notify Kraft if he saw any horses for sale; that petitioner informed Kraft of the availability for purchase of two horses, but that Kraft did not want to purchase the horses until the insurance proceeds from a dead horse arrived; that Kraft was to reimburse petitioner when the insurance proceeds became available; and that petitioner sent the horses to Turcotte to train and race at Kraft's suggestion (Tr. 942-944).

Petitioner also testified that Kraft told him the New Jersey authorities had commenced checking into their ownership of horses and that he wanted to meet with Turcotte to get a story straight to protect his sons' licenses in case the New Jersey Racing Commission[7] questioned his sons and Turcotte (Tr. 945, 950).[8]

2. On oral argument, before the court of appeals, counsel for the government said that there was no investigation in New Jersey at the time of the August 19th meeting. This fact was noted in the original opinion filed by the court of appeals affirming the conviction

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[7]On cross-examination, David Kraft testified that there was no investigation in New Jersey and that petitioner's attempts to influence his testimony concerned the federal investigation (Tr. 422).

[8]On cross-examination, petitioner admitted that he knew his own name had been brought up in the grand jury investigation of the superfectas, and that the FBI was acting as the investigator for the grand jury (Tr. 983, 988). Kraft's testimony revealed that on August 4, 1973 petitioner told him that in previous years he became involved with the twin doubles and got trapped because he had associated with all the "fellows" together (Tr. 171). Kraft testified that petitioner told him that this would not happen again because the fellows he fixed (the drivers at the race tracks), for instance A, B & C, were told not to see each other, and petitioner would take messages back and forth between them (Tr. 171-172). On cross-examination, petitioner testified he remembered making these comments at the August 4 meeting with Kraft (Tr. 992-993). Petitioner also conceded on cross-examination that he remembered discussing with Kraft the subject of grand juries (Tr. 1024-1025; Pet. App. 7a-8a, n 10).

(Pet. App. 7a-8a). In his petition for rehearing, petitioner argued that its opinion relied heavily on a statement that on August 19, 1973, the New Jersey Racing Commission was not investigating Kraft Hill Farm or Kraft's sons (Pet. Rh. 3)[9]. This statement, he argued, was made by government counsel on oral argument, but was factually incorrect. Accordingly, petitioner's testimony at trial that Kraft told him that the New Jersey Racing Commission was investigating Kraft Hill Farm, and Kraft's denial that there was then such an investigation (n. 7, *supra,* p. 5), constituted the only evidence relative to the New Jersey investigation.

Upon this basis petitioner requested the court to "reconsider its decision in light of the actual facts" (Pet. Rh. 5). In light of the request for rehearing, the court of appeals revised its opinion affirming petitioner's conviction (Pet. App. 14a-15a). In this Court, petitioner again asserts that the representation of government counsel was "totally unsupported by the record" (Pet. 3).

While some type of New Jersey investigation apparently commenced on August 15, 1973, the date alleged in his request for rehearing,[10] this did not require the court

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[9]"Pet. Rh." refers to the court of appeals petition for rehearing with suggestion for rehearing *en banc,* a copy of which is being lodged with this Court.

[10]In his petition for rehearing petitioner drew upon facts outside the record to support his claim that there was an investigation in New Jersey. In a previous trial in which petitioner and Elden Turcotte were involved, and in which a mistrial was declared, Mr. Greenberg, the State Steward for the New Jersey Harness Racing Commission, testified that there was an investigation of Kraft Hill Farm and that Kraft Hill's license and the license of Kraft's two sons to own horses were suspended on September 27, 1973 (Pet. Rh. App. 10). Greenberg did not testify when the investigation commenced. In his petition for rehearing, petitioner additionally relied upon a telephone conversation between his counsel and Greenberg on April 26, 1975, that an investigation commenced on August 15, 1973, four days prior to the August 19 meeting between Kraft, petitioner and Turcotte at which the fabricated story was discussed. We understand that on August 15, 1973, an investigator for Harness Track Security talked to a confidential source relative to Kraft Hill Farm. However no open inquiry took place until September 24, 1973, at which time a hearing was held on the possibility of hidden horse ownership.

of appeals to rehear the case. It was sufficient that the court below reconsidered the matter, and in light of the correct information, modified its opinion. The court noted in its modification that the fact of a New Jersey investigation was not established at trial, nor was it shown when, if ever, the New Jersey authorities informed Kraft that they were conducting an investigation (Pet. App. 15a). The court also noted that David Kraft's testimony concerned the federal investigation and not any New Jersey investigation (*ibid.*). In these circumstances, the court of appeals properly upheld petitioner's conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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